IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRI. APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 877 OF 1988

1. Sabbir Ahmed Gulam Rasul Patel
2. Mohammad Farukh Shaikh Ahmed Shaikh
3. Nisar Ahamad Gular Rasul Patel
4. Ekbal Ahmed Sadulla Momin
5. Pappu @ Arit Mohmad Hanif Momin
6. Abubakar Abdul Karim Momin

All residents of Jetunpura,
Bhiwandi, Dist. Thane. ... Appellants
(Ori.Accd.Nos.1,3,4,5,6 & 8)

V/s

The State of Maharashtra
at the instance of
Inspector of Police,
Kumbharwada Police Station,
Bhiwandi, Dist. Thane. ... Respondent

Shri G.H. Keluskar for the appellants.

Shri B.H. Mehta, A.P.P. for the State.

CORAM: R.M.S. KHANDEPARKAR &
P.V. KAKADE, JJ.

DATED: 18TH MARCH, 2005

ORAL JUDGMENT (Per Kakade, J.)

1. The appellants have preferred this appeal against the judgment and order passed by the Addl. Sessions Judge, Thane, on 22.9.1988 whereby they were convicted for commission of the offence punishable under Sections

147 and 148 and under Sec. 302 read with 149 of the I.P.C. For offence under Sections 147 and 148 of the I.P.C. they were each sentenced to undergo R.I. for two years whereas for offence under Sec. 302 read with 149 they were sentenced to life imprisonment and they were to pay fine of Rs.500/- in default to undergo imprisonment for six months. The substantial sentences were directed to run concurrently.

Initially, in all 9 accused persons were prosecuted for the impugned offences, however, accused Nos.2, 7 and 9 were acquitted of all the charges by the Trial Court. Also pending appeal, accused Nos. 1 and 5 (appellant accused Nos. 1 and 4) died and, therefore, the appeal abated so far as they were concerned, only original accused Nos. 3, 4, 6 & 8 have prosecuted the present appeal.

2. The prosecution case in nutshell is thus -

Complainant Sakina had four sons, namely, Rahimbux, Ramzan, Anwar (since deceased) and one Firoz. Anwar is the victim in this case. Firoz was living separately at Mumbai. Deceased Anwar was externed from his residential place at Bhiwandi and was living at

Malegaon. Thus, complainant Sakina was living with her two sons and daughter Nazama. Though the deceased Anwar was externed, he had come to Bhiwandi to attend the Court at Bhiwandi. On that day, deceased attended the Court and it appears that, after taking dinner he went to see Vaiz near a Masjid. Complainant Sakina and other family members retired for the night. At about 1.00 a.m. during the night, deceased Anwar rushed in the house through front door which was kept unlocked for him. He was in frightened condition and saying that he was going to police station. Thereafter he rushed out from rear door. Complainant Sakina closed the front door, however, the door was attacked with stones and there was cry calling on deceased Anwar. Complainant and other family members came out of the house and to their surprise, they found that the assailants had apprehended the deceased Anwar in the open ground near the house of one Hussein Dalal and one Kalva. Accused Nos. 1, 4, 5, 6, 7 & 8 were armed with various deadly weapons. All of them were assaulting the deceased Anwar by means of weapons in their hands. At that time, accused Nos. 2, 7 and 8 were instigating saying that the deceased Anwar is externed and nothing will happen if he is finished. When the complainant Sakina and the family members went to resue the deceased Anwar, the

accused gave threats to finish them also. Accused No.1 Sabbir Ahmad rushed towards Ramzan - brother of the deceased. So Ramzan went inside the house in frightened condition, Rahimbux - another son of complainant and his wife Sultana ran to the police station and reported the matter to the police. It appears that P.S.I. Deshmukh, at that moment received the information and immediately rushed to the spot without taking any entry in the station diary in respect of the information given by Rahimbux and his wife Sultana. P.S.I. Deshmukh arrived on the spot and found that deceased had already succumbed to the injuries. Complainant Sakina, witness Sultana and her husband Rahimbux were then taken to the police station. Complainant Sakina's information was recorded on which basis C.R. No. 289/83 was registered and investigating machiner swung into action.

In the course of the investigation, the statement of the witnesses were recorded. Inquest panchnama was made and body was sent for post-mortem examination and the report was received in due course which is part of the record. Panchnama of the scene of incident was made in which course certain articles were seized. The accused persons came to be arrested during the next few days and at their instances weapons of offences were seized. All

the articles seized in connection with the investigation were sent to the C.A. alongwith blood stained clothes of the deceased as well as the seized clothes of the accused persons. The C.A. report was received in due course which is on record. On completion of the investigation, the chargesheet was sent to the Court of law. The learned Magistrate committed the case to the Court of Sessions at Thane.

3. The learned Trial Judge framed the charges against all the accused persons for the impugned offences to which they pleaded not guilty. Defence of the accused persons was that of total denial of any criminal liability with which they were charged. The prosecution led its evidence which consists of eye-witnesses account as well as circumstantial evidence including the medical evidence and evidence of recovery and seizure of articles. The prosecution evidence was rounded by the P.S.I. Deshmukh. On the basis of available evidence the learned Trial Judge, after hearing both sides, came to the conclusion that accused Nos. 2, 7 and 9 were entitled to be acquitted for want of sufficient evidence, however, remaining accused persons i.e. accused Nos. 1, 3, 4, 5, 6 & 8 were liable to be convicted as there was sufficient evidence established

against them and accordingly proceeded to pass the order of conviction and consequent sentence against them. Hence the present appeal.

As noted earlier, the original accused Nos. 1 and 5 died pending the appeal and, therefore, the appeal is prosecuted only by accused Nos. 3, 4, 6 & 8.

4. We have heard the learned counsel for the appellants as well as learned A.P.P. at length with whose help we have also critically perused the entire evidence on record.

As can be seen from the record, the prosecution case is mainly founded on the basis of occular testimony of witnesses which is again supported by the circumstantial evidence on record. At this juncture, it may be noted that, in the course of the trial, the defence has admitted, under Sec. 294 of the Cr.P.C., the documents of inquest panchnama Exh.25, spot panchnama Exh.26, panchnama of seizure of clothes of accused persons Exh.27 and post-mortem notes Exh.28 and, therefore, no witnesses were examined during the trial to prove the said documents and, therefore, we can safely rely on the said documents in order to corroborate the main evidence

of the witnesses on record.

5. PW No.1 Sakina - mother of deceased Anwar is the complainant as well as eye-witness to the incident. She has stated that her son Anwar was externed on the basis of complaints made by the people in the neighbourhood and was residing at Malegaon, however, he had come to Bhiwandi for Court work on the fateful day. After Court work was over, he came to the house and again went out saying that he was going to attend Moharram Tazia at about 11.00 p.m. Thereafter Sakina and her family members retired to bed, however at about 01.00 a.m. in the night deceased Anwar rushed back to the house and came in from the front door which was kept unlocked for him. He came in frightened condition and told that he was going to the police station and rushed out of the house from rear side. Sakina closed the front door, however, somebody pelted stones on the door. She followed deceased Anwar from rear door. There were street lights on and she saw accused No.1 dragging deceased Anwar from latrine side. He was dragged upto the street light near the house of one Dalal. Accused No.1 assaulted deceased by means of gupti. Sakina asked accused No.1 not to beat Anwar, however, accused No.1 gave one more blow of gupti on Anwar. Then accused No.4

Nisar assaulted deceased by means of sword and then accused No.4 ran away. Accused No.5 assaulted Anwar with sickle, then accused No.6 assaulted Anwar with weapon in his hand, then accused No.8 again gave blow of knife on Anwar, then accused No.3 assaulted Anwar with big iron rod. Then all the accused persons ran away. All the time she was requesting accused persons not to assault her son Anwar. Her family members also had come out following her. Then complainant Sakina, son Rahimbux and Sultana went to the police station. She also went to the police station and filed her complaint vide Exh.22.

Now this version is totally corroborated by complainant's F.I.R. which was recorded by P.S.I. Deshmukh immediately after the incident who had rushed to the spot on information received by him from Rahimbux. Inspector Deshmukh had taken Sakina to the police station and recorded her complaint which is at Exh.22.

6. At this juncture, it may be noted that it has come in the evidence that Rahimbux and Sultana initially went to Inspector Deshmukh and informed him about the incident, however, instead of recording their statements

or making station diary entry, Inspector Deshmukh rushed to the spot to make assessment of the situation and found that Anwar had already died and, therefore, he took Sakina to the police station and recorded her statement in the form of complaint. The learned counsel for the appellant vehemently urged that, in fact the complaint Exh.22 is not the F.I.R. but merely statement under Sec. 161 of Cr.P.C. According to him, the true F.I.R. was the information given by Rahimbux and Sultana to Inspector Deshmukh. However, it is evident that Inspector did not make any record of the said information and thought it fit to rush to the scene of the incident. In our considered view, no fault can be found with the act of the Inspector Deshmukh when he found it necessary to rush to the scene in order to make attempt to save Anwar if possible. Therefore, the fact that Rahimbux and Sultana's statements were not recorded by the Inspector. The statement recorded of Sakina by him after returniing to the police station would definitely assume characteristics of the F.I.R. for all the relevant purposes and no technical fault could be found in this regard with the procedure adopted by the investigation machinery.

7. Be that as it may, the fact remains that Sakina's

complaint Exh.22 was recorded within an hour or so after the actual occurrence of the incident and perusal of the said complaint Exh.22 gives graphic information regarding the involvement of all the accused persons and, therefore, the overtact was committed in assaulting her son Anwer with various weapons. In view of this position, we have no doubt whatsoever that Sakina's evidence is sufficient to inspire confidence and is found totally trustworthy which is again corroborated by her complaint recorded immediately after the incident naming all the assailants of deceased Anwar.

8. The evidence of PW-2 sister-in-law of the deceased and wife of Rahimbux is also important as she is the eye- witness to the incident. She has categorically supported the version putforth by Sakina and has given graphic description as to how the assault took place on deceased Anwar. PW-3 Ramzan - other son of Sakina, has also stated that he was present at the time of the incident and when he saw that Anwar was surrounded by all the assailants he wanted to rescue him and, therefore, Ramzan tried to go to him however accused No.1 threatened him with weapons in his hand, as a result he was frightened and rushed inside the house and, therefore, did not actually witness the assault on

the deceased. However, his evidence is sufficient to establish the fact that the assailants committed ghastly crime and killed his brother Anwar, at which time accused Nos. 1 and 6 threatened him when he tried to rescue his brother. Therefore, for all the practical purposes, the evidence of PW-3 Ramzana is sufficient to corroborate the eye-witness testimony of Sakina as well as Sultana.

9. The learned counsel for the appellants submitted that all the material witnesses were close relatives of the deceased and, therefore, their evidence deserves to be discarded as they are partisan witnesses. In this regard, we must note that it is well settled legal position, as reiterated by the Apex Court in the case of **Bhargavan & ors. v/s State of Kerala, reported in 2004 Cri.L.J. 646,** that the fact that the witness is a close relative and consequently the partisan witness cannot be a ground to reject his testimony. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Therefore, it is clear that evidence of witness Sakina and Sultana supported by evidence of Rahimbux is sufficient to establish the identity of all the accused

persons at the relevant time and place, attributing the overtact committed by them in assaulting deceased Anwar with deadly weapons as a result of which he was killed. It must be noted that all the said witnesses were critically cross-examined at length but no infirmity was elicited to cast doubt on their veracity. Under such circumstances, there is absolutely no reason as to why testimony of these witnesses giving occular account of the events should not be accepted. We are of the considered view that the evidence of all these three witnesses is found to be trustworthy and sufficient to bring home the guilt against the accused persons.

This aspect takes us to the circumstantial evidence on record. As noted earlier, the inquest panchnama Exh.25 and post-mortem notes Exh.28 are admitted by the defence under Sec. 294 of the Cr.P.C. If we peruse the post-mortem examination report, it is seen that, following injuries were found on the body of deceased Anwar:-

(1) Incised wound left anterior chest in mid-clavicular region 1" below the left nipple, verticle size is 1" x 1/2" x vacitydeep.

(2) Incised wound Rt. anterior chest over lower thoracis on midcavicular line verticle 1" x 1/2" x cavity deep.

(3) Incised wound over left side of abdomen over lumber region verticle 2" x 1" x cavity deep, intestine and omentum out.

(4) Incised wound over left anterior abde 1" x below the injury No.3 1/2" x 1/4" muscle deep.

(5) Incised wound over suprapubic region oblique 1" x 1/4" muscledeep.

(6) Abrasion over Rt. forehead 1" x 1/4" horizontal.

(7) Multiple small contusion over Rt. Arm and forearm of various sized. Caused by sharp instruments for injury Nos. 1 to 5. Caused by hard and rough substance for injury Nos. 6 & 7, H & H No.8.

As against this, the inquest panchnama shows that there were 6 injuries noted at the time of panchnama by the

said panchas on the person of the deceased. On this basis, the learned counsel for the appellants sought to agitate that there were discrepancies between the inquest panchnama and post-mortem report and, therefore, both the documents were not reliable. In this regard, we must note firstly that, both these documents are admitted by the defence and, therefore, cannot be contraverted at the stage of appeal. Moreover, even if those are taken into consideration, it must be noted that the inquest panchnama is made by the laymen and not by the medical officer after critically examining the body for external as well as internal injuries. Therefore, absence of mentioning of some injuries in the case of inquest panchnama cannot render the medical evidence, regarding injuries, as false or unreliable. It was further submitted on behalf of the appellants that perusal of the occular testimonies and post-mortem examination would show that description made by the eye-witnesses of the assault on Anwar does not tally with the injuries noted in post-mortem report and, therefore, it would not be safe to rely on the occular account given by the eye-witnesses. We prefer to disagree with this proposition. It is well settled principle of law that it is trite that where the eye-witnesses account is found credible and trustworthy, medical opinion or notion

pointing to alternative possibility is not accepted as conclusive. Witnesses, as Bantham said, are the eyes and ears of justice. Hence, the importance and primacy of the quality of the trial process. Eye-witnesses account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touch-stone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts the "credit" of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation. If we take into account this well settled principle of criminal jurisprudence, it is found that the evidence of eye-witnesses in the present case is found to be totally trustworthy and, therefore, has to be accepted in toto.

10. The direct evidence led by the prosecution is further consolidated by the circumstantial evidence on record. It is seen that accused Nos. 1, 2, 5, 6, 4 & 7

have, while in police custody volunteered to show the spot where they had hidden the weapons of offence and at their instance those were recovered, which articles are before the Court. No doubt that panch witnesses of memorandum of panchnama of recovery of such articles have turned hostile. However, we are satisfied that those witnesses are not stating true position either under coercion or otherwise. Be that as it may. The testimony of P.S.I. Deshmukh is sufficient to show that such articles were seized at the instance of the said accused persons and those are the same which were used in the commission of the offence involved in this case. Articles 10, 11, 12 & 13 are gupti, knife and swords which were found with blood stains. Articles 10, 11 and 12 i.e. two guptis and knife were found to have blood stains of blood group "A". The C.A. report further shows that the blood group of deceased Anwar was of Group "A". Therefore, we are also satisfied that the said weapons which were recovered at the instance of the said accused persons under Sec. 27 of the Evidence Are are the same with which deceased Anwar was killed by the assailants at the relevant time and place.

11. We have seen earlier that the accused persons are found guilty of commission of the impugned offences with

the aid of Sec. 149 of the I.P.C. The evidence on record is more than sufficient to show that all the accused persons formed unlawful assembly in prosecution of common object to kill Anwar. The motive behind the act is also apparent from the facts that the accused persons are from the neighbourhood and Anwar was externed on the basis of complaints filed by the people in the neighbourhood and hence it was obvious that when accused persons found Anwar had infringed the condition of externment and had entered Bhiwandi, they had apprehension that he would act against them. So far as conviction under Sec. 149 of the I.P.C. is concerned, it must be noted that evidence on record is sufficient to show overtact on the part of each and every accused persons. It cannot be laid down as a general proposition of law that unless an overtact is proved against a person who is alleged to be a person of unlawful assembly, it cannot be said that he was a member of a assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Sec. 141 of the I.P.C. The word "object" means the purpose or design and, in order to make it "common" it must be shared by all. In other words, the object should be common to the persons who compose the assembly that is to

say that they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members may just join and adopt it.

In the present case before us, as noted earlier, the attack on deceased Anwar is established to be pre-meditated and the very fact that the majority of the assailants were carrying deadly weapons and in fact chase of Anwar by accused would show that their unlawful assembly was in prosecution with a common object to kill Anwar.

At one stage, the learned counsel for the appellant brought to our notice that it has come in the evidence of PW-3 that when Anwar entered the house in about 1.00 a.m. in the night he had sustained injury on his person and then ran out from the rear side, however, this fact is not mentioned either by Sakina or Sultana in their testimonies and, therefore, it was submitted that Anwar was assaulted by some other persons earlier. In this regard, it must be noted that, though it is true that neither Sakina nor Sultana have mentioned about the injury of Anwar when he came in the house, but that does

not mean that the crime was committed by somebody else especially when we have perused the substantial evidence of witnesses Sakina and Sultana. Therefore, it is obvious that, deceased Anwar was earlier stabbed by one of the accused persons and, therefore, he rushed to his house and ran away through the rear side door obviously because the accused persons came chasing him again. Therefore, there cannot be any doubt whatsoever that the assailants are none else than the accused persons.

12. For the reasons recorded above, we, therefore, hold that the prosecution has established the guilt of the accused persons. The learned Trial Judge has given benefit of doubt to accused Nos. 2, 7 & 9 for want of sufficient evidence, however, he found other accused persons guilty for commission of the impugned offences. As noted earlier, accused Nos. 1 & 5 are already dead and accused Nos. 3, 4, 6 & 8 are party to this appeal. We are inclined to agree with the reasonings adopted and findings recorded by the learned Trial Judge.

13. In the result, the appeal is found to be devoid of merits and thus stands dismissed.

Appellants 2, 3, 5 & 6 (Original accused Nos. 3, 4, 6 &

8) are on bail and are directed to surrender before the Sessions Judge, Thane, in order to undergo sentences imposed against them within six weeks from the date of this order. Their bail bonds stand cancelled.

(R.M.S. Khandeparkar, J.)

(P.R. Kakade, J.)